No. 00-346

(5)

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Petitioner,

v.

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 30, 2000
CERTIORARI GRANTED DECEMBER 11, 2000

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

2:98cv382		Garris v. Norfolk Shipbuilding, et al
4/9/98	1	COMPLAINT; Filing Fee $150.00 paid by Kaufman & Canoles; Receipt #200-16791 (mwin) [Entry date 04/13/98]
5/4/98	4	MOTION by E. T. Gresham, Inc. to Dismiss for failure to state a claim (mwin) [Entry date 05/06/98]
5/4/98	5	MEMORANDUM by E. T. Gresham, Inc. in support of [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim, received (mwin) [Entry date 05/06/98]
5/5/98	6	MOTION by Norfolk Shipbuilding to Dismiss for failure to state a claim (mwin) [Entry date 05/06/98]
5/5/98	7	MEMORANDUM by Norfolk Shipbuilding in support of [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim, received (mwin) [Entry date 05/22/98]
5/18/98	8	MEMORANDUM by Celestine Garris in opposition to [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim and [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim, received (mwin) [Entry date 05/22/98]

Appendix A

5/26/98	10	REPLY Brief by Norfolk Shipbuilding to response to [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim, received (mwin) [Entry date 06/02/98]
5/26/98	—	Motion hearing re: [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim set at 11:00 6/19/98, [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim set at 11:00 6/19/98 (mwin) [Entry date 06/02/98]
5/28/98	11	NOTICE of hearing by E. T. Gresham, Inc. (mwin) [Entry date 06/02/98] [Edit date 06/02/98]
6/1/98	12	NOTICE of hearing by Norfolk Shipbuilding (mwin) [Entry date 06/02/98]
6/19/98	—	Motion hearing held re: [6-1] motion by Norfolk Shipbuilding to Dismiss for failure to state a claim by Norfolk Shipbuilding, [4-1] motion by E. T. Gresham, Inc. to Dismiss for failure to state a claim by E. T. Gresham, Inc. (rlam)
6/19/98	13	Minute entry: COURT PROCEEDINGS — JBF,j. Sue Ash, Reporter. Counsel and plaintiff appeared. Matter came on defendants' motions to dismiss. Argument of counsel heard. Court ruled from the bench DISMISSING the federal claims with

prejudice and DISMISSING the state claims without prejudice to file in state court. Court to prepare an order. Court noted the appeal time to run from date of written opinion and order. Court adjourned. (rlam)

8/31/98 14 OPINION AND FINAL ORDER granting [6-1] motion by Norfolk Shipbuilding to Dismiss; granting [4-1] motion by E. T. Gresham, Inc. to Dismiss; Dismissing plaintiff's claims under general maritime law with prejudice; declining to exercise supplemental jurisdiction over plaintiff's pendant state law claims, and Dismissing same without prejudice; entered and filed 8/31/98 (signed by Judge Jerome B. Friedman) Copies Mailed: 8/31/98 (mwin)

8/31/98 15 JUDGMENT granting defendants' motions to dismiss, and dismissing plaintiff's claims under general maritime law with prejudice; declining to exercise supplemental jurisdiction over plaintiff's pendant state law claims, and dismissing same without prejudice; entered by clerk and filed 8/31/98. Copies Mailed: 8/31/98. ob (mwin)

9/11/98 16 NOTICE OF APPEAL OF [15-1] judgment order, [14-1] order Dismissing plaintiff's claims under general maritime law with prejudice by Celestine Garris. FILING FEE $ 105.00 RECEIPT # 18307 (forb) [Entry date 09/15/98]

Appendix A

9/15/98 — Copy of Notice of Appeal, Judgment, Opinion and Final Order and docket sheet to USCA: copy of notice of appeal and docketing statement to counsel for plaintiff; copy of notice of appeal to counsel [16-1] appeal by Celestine Garris (forb)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

98-2368 Garris v. Norfolk Shipbuilding, et al

9/17/98	Civil case docketed. (sn)
10/1/98	Certification of ROA complete and retained in the District Court. [98-2368] (sn)
3/4/99	Certification transcript filed in district court by Sue Ash on 3/2/99. [98-2368] (sn)
3/17/99	Certification of ROA complete and retained in the District Court. [98-2368] (sn)
4/13/99	Brief joint appendix filed by Appellant Celestine Garris. Type of Service: HD Copies of brief: 8 # brf pages: 20 Copies of apx: 6 # apx pages: 56 Sufficient?[Y/N]: y 2-sided copying: y [98-2368] Appellee brief due 5/13/99 for E T Gresham Inc, for Norfolk Shipbuilding. (rhs)
5/17/99	Brief filed by Appellee Norfolk Shipbuilding, Appellee E T Gresham Inc. Type of Service: PM Copies: 8 # brf pages: 31. Sufficient [Y/N]: y. [98-2368] (rhs)
12/2/99	Oral argument heard. Courtroom Deputy: JLC, Jr. [98-2368] (jc)
4/3/00	Published, authored opinion filed. [98-2368] (amy)

Appendix B

4/3/00 Judgment order filed. Decision: reversed and remanded. EOD Date: 4/3/00. [98-2368] (amy)

4/17/00 Petition filed by Appellee Norfolk Shipbuilding, Appellee E T Gresham Inc for rehearing. Number copies filed: 20 [3171077-1]., for rehearing en banc. [3171077-2] [98-2368] (sn)

4/20/00 Motion filed by Appellee E T Gresham Inc to dismiss Appellee E T Gresham Inc as party to the appeal [3171831-1]. [98-2368] (sn)

4/24/00 Letter referencing motion to dismiss party [3171831-1] and a copy of the order dated 7/13/99 in the Circuit Court for the City of Norfolk (filed by Appellee E T Gresham Inc) [3173318-1] [98-2368] (amy)

4/24/00 Response/answer requested to motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2] [98-2368] (amy)

5/1/00 COURT ORDER filed granting motion to dismiss party [3171831-1] Copies to all counsel. [98-2368] (amy)

5/4/00 Response/answer filed [3179796-1] by Appellant Celestine Garris to motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2] [98-2368] (sn)

6/1/00 COURT ORDER filed denying motion for rehearing [3171077-1] EOD Date: 6/1/00,

	denying motion for rehearing en banc [3171077-2] EOD Date: 6/1/00. Copies to all counsel. [98-2368] (sn)
6/2/00	Corrected order filed per HEW's directions. Order is dissent from order of 6/1/00 disposing of motion for rehearing [3171077-1], motion for rehearing en banc [3171077-2]. [98-2368] (sn)
6/9/00	Mandate issued. [98-2368] (sn)
7/6/00	Motion filed by Appellee Norfolk Shipbuilding to recall the mandate file a petition for writ of certiorari [3214711-1]. [3214711-1], to stay the mandate [3214711-2]. [98-2368] (dad)
7/10/00	COURT ORDER filed granting motion to recall the mandate [3214711-1], granting motion to stay mandate [3214711-2] pending petition for a writ of certiorari. Copies to all counsel. [98-2368] (amy)
9/8/00	Supreme Court notice that petition for certiorari was filed on 08/30/00. Spct No.: 00-346 Spct Pty 1: Norfolk Shipbuilding & Drydock Corporation Spct Pty 2: Celestine Garris. [98-2368] (jh)
10/26/00	Federal Reporter Citation: 210 F.3d 209. [98-2368] (vsl)
12/18/00	Supreme Court order received granting petition certiorari [3249473-1] on 12/11/00. [98-2368] (dhb)

APPENDIX C — COMPLAINT DATED AND FILED APRIL 9, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:98-CV-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

SERVE: John L. Roper, IV
Registered Agent
750 Berkley Avenue
Norfolk, Virginia 23523

and

E. T. GRESHAM, INC.,

SERVE: Earl T. Gresham
Registered Agent
1038 West 26th Street
Norfolk, Virginia 23517

Defendants.

Appendix C

COMPLAINT

NOW COMES the plaintiff, Celestine Garris, Administratrix of the Estate of Christopher Garris, deceased, by counsel, and for her Complaint, states as follows:

1. This is a maritime and admiralty action within the meaning of Rule 9(h) and 28 U.S.C. § 1333.

2. The plaintiff is the mother of, and Administratrix of the Estate of Christopher Garris, deceased, who sustained fatal injuries on April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, while the vessel was berthed at Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), Norfolk, Virginia, in the navigable waters of the United States of America.

3. The plaintiff believes that the plaintiff's deceased was employed by Tidewater Temps, Inc. ("Tidewater") to perform sand blasting work for Mid-Atlantic Coatings, Inc. ("Mid-Atlantic"), a sub-contractor of NORSHIPCO.

4. The defendant, NORSHIPCO, is a ship repair company who had contracted to perform certain work on the USNS MAJ. STEPHEN W. PLESS.

5. The defendant, E. T. Gresham, Inc. ("Gresham"), was a subcontractor of either Mid-Atlantic or NORSHIPCO, and had responsibilities with regard to the provision of and/or operation of a crane alongside the USNS MAJ. STEPHEN W. PLESS.

Appendix C

6. On April 8, 1997, while working aboard the USNS MAJ. STEPHEN W. PLESS, the plaintiff's deceased sustained injuries and died on April 9, 1997, as a result of the negligence of the defendants, jointly and severally.

7. The plaintiff demands damages pursuant to the general maritime law for funeral expenses, pain and suffering of the decedent prior to his death, loss of society and loss of services, and for damages pursuant to the Virginia Wrongful Death Act, § 8.01-52.

WHEREFORE, the plaintiff prays for judgment against the defendants, jointly and severally, in the amount of Two Million and 00/100 Dollars ($2,000,000.00).

CELESTINE GARRIS, Administratrix
of the ESTATE OF CHRISTOPHER
GARRIS, deceased

By s/ John R. Crumpler, Jr.
Of Counsel

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APPENDIX D — NORSHIPCO'S MOTION TO DISMISS DATED AND FILED MAY 6, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CIVIL ACTION NO. 2:98-CV-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION, et al.,

Defendants.

NORSHIPCO'S MOTION TO DISMISS

Defendant, Norfolk Shipbuilding & Drydock Corporation ("NORSHIPCO"), by counsel, hereby moves to dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that plaintiff has failed to state a claim against it for which relief may be granted. In support of this motion, NORSHIPCO adopts the arguments and authority contained in the brief which is filed in support of this motion.

Appendix D

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION

By: s/ Robert M. Tata
Of Counsel

Robert M. Tata (BAR NO. 30101)
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APPENDIX E — OPINION AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED AND FILED AUGUST 31, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Civil Action No. 2:98-cv-382

CELESTINE GARRIS, Administratrix of the ESTATE OF CHRISTOPHER GARRIS, deceased,

Plaintiff,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

and

E.T. GRESHAM, INC.,

Defendants.

OPINION AND FINAL ORDER

This matter comes before the Court on Defendants' Motions to Dismiss for Failure to State a Claim. For the reasons stated below, the Court finds that no cause of action exists, under general maritime law, for death of a nonseaman in state territorial waters resulting from negligence.

Appendix E

Defendants' motions to dismiss are GRANTED, and Plaintiff's federal claims are DISMISSED with prejudice. The Court declines to exercise supplemental jurisdiction under Title 28, United States Code Sections 1367(a) and (c)(3) over Plaintiff's Virginia Wrongful Death Act claim; the state claim is therefore DISMISSED without prejudice.

I. Factual Background

Celestine Garris, as Administratrix of the Estate of Christopher Garris, seeks damages relating to the death of Christopher Garris. Plaintiff's claims are brought under both general maritime law and the Virginia Wrongful Death Act. While the parties do not agree on the actual series of events which led to the death of Christopher Garris, those factual discrepancies need not be resolved for purposes of ruling on Defendants' motions.

According to the Plaintiff, on April 8, 1997, the decedent was performing sandblasting work on the USNS MAJOR STEPHEN W. PLESS for Mid-Atlantic Coatings, Inc. ("Mid-Atlantic") through a temporary agency. Norfolk Shipbuilding & Drydock Company ("NORSHIPCO"), a ship repair company who had contracted to perform work on the vessel, sub-contracted the sandblasting work to Mid-Atlantic. To accomplish the sand-blasting, a pre-loaded hopper of sandblast shot was lifted from the pier to the opening of a silo located on the deck of the vessel. A door on the underside of the hopper was then opened to release the shot, depositing the shot in the opening of the silo. The particular silo in question was approximately 30 feet in height. Christopher Garris fell from the top of the silo onto the deck of the vessel,

sustaining fatal injuries in the fall. Garris passed away on April 9, 1997.[1] The USNS MAJOR STEPHEN W. PLESS was docked in Norfolk, Virginia, in the navigable waters of the United States of America at the time of the incident.

Plaintiff seeks damages under general maritime law for funeral expenses, pain and suffering of the decedent, loss of society, and loss of services. In a pendant state claim, Plaintiff seeks damages pursuant to the Virginia Wrongful Death Act.

II. Analysis

A. Standard of Review

In a Motion to Dismiss, the complaint is construed in the light most favorable to the plaintiff, and the plaintiff's allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeither*, 395 U.S. 411, 421 (1969). Nonetheless, the Fourth Circuit has held that "[c]onclusory allegations regarding the legal effect of the facts alleged" need not be accepted as true. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir.1995). In order for the Court to grant a motion to dismiss, it must appear to a certainty that

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1. The Plaintiff received death benefits under the Longshore and Harbor Workers' Compensation Act, and filed suit in state court seeking additional recovery. Under Virginia law, no general maritime cause of action exists for negligence for the death of a nonseaman in state territorial waters. *See, e.g., Brown v. Brown*, 226 Va. 320, 327, 309 S.E.2d 586, 590 (1983). Plaintiff nonsuited the state court action following the filing of a demurrer and miscellaneous other motions by Defendants. The instant action was filed shortly thereafter.

the plaintiff cannot prove *any* facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1993).

B. Negligence Action Under General Maritime Law

The sole issue before this Court is whether Plaintiff may properly maintain a negligence action under general maritime law. The Supreme Court first recognized a general maritime law cause of action for death occurring from a breach of maritime duties in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). Plaintiff argues that in the *Moragne* decision, the Supreme Court intended to establish the propriety of both unseaworthiness and negligence claims under general maritime law. Defendants submit that the Supreme Court's recognition in *Moragne* was limited to unseaworthiness claims, and that general maritime law has not been extended to include a negligence cause of action for the wrongful death of a nonseaman in state territorial waters. *See Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir.1982) (Hoffman, District Judge sitting by designation) (recognizing *Moragne* "pertained only to an unseaworthiness claim"); *Minnick v. United States*, 767 F.Supp. 115, 118-119 (E.D. Va.1990) (noting "*Moragne* created a general maritime wrongful death cause of action for unseaworthiness").

The *Moragne* decision was a necessary reaction to an antiquated common law holding. In rendering the decision it did, the Supreme Court filled an obvious void that materialized following the enactment of the Death on the High Seas Act and the Jones Act. Prior to *Moragne*,

no federal cause of action existed for wrongful death in state territorial waters due to unseaworthiness. The Supreme Court has never applied its holding in *Moragne* to negligence claims, although some jurisdictions have expanded the decision to allow negligence actions under general maritime law, or otherwise held the decision intended to provide a general maritime law action for both unseaworthiness and negligence. *See, e.g., Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980) (holding the need for uniformity requires extension of Moragne to negligence claims); *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) (noting, without citation, that *Moragne* recognized actions for both unseaworthiness and negligence.); *Neil v. McGinnis*, 716 F.Supp. 996 (E.D. Ky. 1989); *Garner v. Dravo Basic Materials*, 768 F.Supp. 192 (S.D. W.Va. 1991); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F.Supp. 1151 (S.D. Fla. 1992); *but see generally Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979).

The 1972 amendments to the Longshore and Harbor Workers' Compensation Act superseded the holding in *Moragne*, foreclosing a general maritime law wrongful death action by the survivors of a longshoreman or harbor worker. *See* 33 U.S.C. §§ 901-950; *Miles v. Apex Marine*, 498 U.S. 19, 28 (1990). Defendants submit that this responsive legislative action cautions against the extension of *Moragne* beyond unseaworthiness, an argument with which the Court is inclined to agree. The Court, however, must also take into consideration the Supreme Court's more recent decision in *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996), as well as decisions previously rendered by other judges of this district.

Appendix E

In *Minnick v. United States*, *supra*, the parties assumed a negligence action could be pursued under general maritime law. Judge Clarke, in reviewing *Moragne* and the cases interpreting *Moragne*, found the assumption to be incorrect, noting that *Moragne* created only a general maritime wrongful death cause of action for unseaworthiness. *Minnick*, 767 F.Supp. at 117-18.[2] Similarly, Judge Hoffman, sitting on the Eleventh Circuit by designation, considered "whether *Moragne* should be extended to permit recovery under general maritime law for wrongful death caused by negligence." *Ford*, 681 F.2d at 716. Judge Hoffman, writing for a panel of the Eleventh Circuit, held that *Moragne* pertained only to unseaworthiness claims, and that subsequent Supreme Court decisions supported this finding. *Id.* at 715. Although the decisions in *Minnick* and *Ford* predated the Supreme Court's opinion in *Yamaha*, the Court finds the reasoning of Judges Hoffman and Clarke in those decisions remains sound.

Yamaha held the general maritime wrongful death action recognized in *Moragne* did not preempt state remedies for non-seaman deaths in territorial waters. *Id.* at 215. In rendering this decision, the Supreme Court created some confusion regarding the current status of the law. The Court noted in footnote seven, that:

> If *Moragne's* wrongful death action did not extend to non-seafarers like Natalie [injured in a jet ski accident], one could hardly argue that *Moragne*

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2. Judge Clarke further found that the plaintiff in *Minnick* could pursue a negligence action under LHWCA, allowing the plaintiff leave to amend to assert the appropriate claim. *Minnick*, at 117-18.

> displaced the state law remedies the Calhouns seek. Lower courts have held that *Moragne's* wrongful death action extends to non-seafarers. (Citations omitted). *We assume, for purposes of this decision,* the correctness of that position. Similarly, as in prior encounters, we assume *without deciding* that *Moragne* also provides a survival action. [Citation omitted.] The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock. [Emphasis added.]

Yamaha, 516 U.S. at 209, n. 7. Plaintiff also relies on footnote eleven in an attempt to persuade the Court that *Moragne* recognized negligence claims under general maritime law in addition to unseaworthiness claims. In footnote eleven, *Yamaha* correctly notes that the right of action, as stated in *Moragne*, established a cause of action "for death caused by violations of maritime duties." *Id.* at 214, n. 11. Nonetheless, unseaworthiness was the doctrine at stake before the Court in *Moragne*, not negligence. A thorough analysis of *Yamaha* reveals that in *Yamaha*, the Supreme Court reserved the issue of whether a wrongful death action sounding in negligence exists under general maritime law.[3]

The generality with which the Court spoke in *Moragne* is not sufficient to establish a general maritime law cause of

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3. Defendants also offer authority from the Virginia Supreme Court, in which the Court recognized that claims under general maritime law were restricted to claims of unseaworthiness. *See Brown v. Brown*, 226 Va. 320 (1983).

action for negligence in light of *Yamaha's* reservation of the issue, and the absence of any Supreme Court decision applying *Moragne* to negligence. Neither the arguments nor the case law set forth by Plaintiff are persuasive in her attempt to have this Court extend the application of general maritime law to negligence actions.

III. Conclusion

Accordingly, Defendants' Motions to Dismiss are **GRANTED** and Plaintiff's claims under general maritime law are **DISMISSED** with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiff's pendant state law claims, and the same are **DISMISSED** without prejudice.

The Clerk is **REQUESTED** to send a copy of this Opinion and Order to counsel for the Plaintiff and counsel for the Defendant.

It is so **ORDERED**.

s/ Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

August 31, 1998

Norfolk, Virginia

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED APRIL 3, 2000

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-2368

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff-Appellant,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION; E.T. GRESHAM, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge.
(CA-98-382-2)

Argued: December 2, 1999

Decided: April 3, 2000

Before MURNAGHAN and WILLIAMS, Circuit Judges, and Cynthia Holcomb HALL, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

* * *

Appendix F

OPINION

WILLIAMS, Circuit Judge:

The sole issue on appeal is whether we should construe or extend the United States Supreme Court's decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, to include a general maritime law cause of action for wrongful death based upon negligence. We agree with the district court that the Supreme Court did not create a general maritime law cause of action for wrongful death based upon negligence in *Moragne*. We find it appropriate, however, to apply the principles of *Moragne* and its progeny to recognize one. We, therefore, reverse the district court's dismissal of Celestine Garris's claim and remand for further proceedings.

I.

Christopher Garris (Garris's son) worked as a sandblaster aboard the USNS MAJ. STEPHEN W. PLESS, a ship berthed in the navigable waters of the United States. He was actually employed by Tidewater Temps but worked on behalf of Mid-Atlantic Coatings (Mid-Atlantic), a subcontractor of Norfolk Shipbuilding & Drydock Corporation (Norfolk). E.T. Gresham, Inc. (Gresham), another subcontractor for Norfolk, had employees aboard the same ship. On April 8, 1997, a crane operator working for Gresham accidentally caused Garris's son to fall off a reserve hopper on the ship, which was used to load sand for sandblasting. Garris's son died as a result of the accident.

Appendix F

After receiving statutory death benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), Christopher Garris's mother, Celestine Garris (Garris), brought suit in the United States District Court for the Eastern District of Virginia against Norfolk and Gresham, seeking recovery for wrongful death based upon negligence under general maritime law and the Virginia wrongful-death statute. According to Garris, the crane operator's negligence and Norfolk's use of an inadequate communication signaling system were the reasons for her son's death. The district court dismissed her suit on the ground that general maritime law does not recognize a negligence-based cause of action.[1]

Garris argues on appeal that the Supreme Court's holding in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which recognized a general maritime law cause of action for wrongful death based upon unseaworthiness, also established a general maritime law cause of action for wrongful death based upon negligence. In the alternative, Garris asks us to extend the holding of *Moragne* to create a general maritime law cause of action for wrongful death based upon negligence. Reviewing this legal question de novo, *see Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991) ("We review the district court's determinations of law de novo."), we conclude that the principles developed

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1. The district court dismissed with prejudice Garris's general maritime law wrongful-death claim. The district court dismissed without prejudice her state law claim under the Virginia wrongful-death statute. Garris has not appealed the district court's dismissal of her state law claim and has since filed that claim in state court only against Gresham.

in *Moragne* and its progeny compel us to recognize a negligence-based action. We, therefore, reverse the district court's dismissal of this claim and remand for further proceedings.

II.

In order to determine whether the district court erred in dismissing Garris's suit, we must first consider whether the Supreme Court in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), intended to create a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we must examine the language and context of *Moragne*, including the events and developments leading up to the Supreme Court's decision in that case.

A. Pre-*Moragne*

Our discussion begins with *The Harrisburg*, 119 U.S. 199 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), in which the Supreme Court held that general maritime law did not allow recovery for wrongful death. In *The Harrisburg*, the widow and child of the decedent, Rickards, sought to recover damages for Rickards's death "caused by the negligence of the steamer" that collided with Rickards's schooner. *See id.* at 199. The Court had to determine whether Rickards's survivors could recover for wrongful death absent a state statute or act of Congress affirmatively allowing such recovery. *See id.* at 204. The Court noted that at common law there was no civil action for an injury that resulted in death and that English maritime law also had no cause of action for wrongful death on the high seas. *See id.* The Court concluded that because

> it is now established that in the courts of the United States no action at law can be maintained for [wrongful death] in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.

Id. at 213.

Despite the rule of *The Harrisburg*, which prohibited recovery for wrongful death under general maritime law, two significant developments in maritime law softened the harshness of *The Harrisburg*. First, in 1920, Congress enacted both the Death on the High Seas Act (DOHSA), 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1999), and the Jones Act, 46 U.S.C.A. app. § 688 (West Supp. 1999), which afforded recovery for wrongful death in certain circumstances.[2]

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2. DOHSA provides, in pertinent part, that "[w]henever the death of a person shall be caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States." 46 U.S.C.A. § 761 (West 1975). DOHSA, therefore, provides a federal claim for the wrongful death of any person that occurs more than a marine league, or three miles, from shore.

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Second, federal courts began to recognize the application of state wrongful-death statutes to fatal accidents that occurred in state territorial waters. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-08 (1996) (describing the response of "[f]ederal admiralty courts [in] temper[ing] the harshness of *The Harrisburg*'s rule by allowing recovery under state wrongful-death statutes"); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921) (finding that California's wrongful-death statute applied to the death of a maritime worker in state territorial waters). Consequently, in the years that followed *The Harrisburg*, state wrongful-death statutes — which often encompassed wrongful-death causes of action based upon negligence, but not unseaworthiness, *see Moragne*, 398 U.S. at 398-99 — "proved an adequate supplement to federal maritime law[ ] until a series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict liability rule."[3] *Yamaha*, 516 U.S. at 207-08. Because of this new development in maritime law, unseaworthiness, which originally was an obscure and rarely used cause of action for which many state wrongful-death statutes did not

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The Jones Act states that "[a]ny seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages at law . . . and in case of death of such seaman as a result of any such personal injury the personal representative may maintain an action for damages at law. . . ." 46 U.S.C.A. app. § 688(a) (West Supp. 1999). Thus, the Jones Act permits recovery for the wrongful death of a seaman in all navigable waters.

3. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944), *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), and *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960), all set forth and developed the rule that a shipowner's liability for unseaworthiness is absolute.

account, evolved into a cause of action that "soon eclipsed ordinary negligence as the primary basis of recovery when a seafarer was injured or killed." *Id.* at 208. The evolution of the unseaworthiness doctrine, however, also created gaps in the law whereby recovery for wrongful death based upon unseaworthiness could depend on mere happenstance. For example, if death occurred within state territorial waters, then recovery was unlikely because many state wrongful-death statutes did not include causes of action based upon unseaworthiness. *See Moragne*, 398 U.S. at 395. By contrast, if the death occurred more than three miles from shore, then recovery for wrongful death based upon unseaworthiness was possible under DOHSA. *See id.* The emergence of unseaworthiness as a viable and powerful tool for asserting claims against shipowners, and the discrepancies that necessarily followed, set the stage for *Moragne*, which gave the Supreme Court the opportunity to revisit the vitality and soundness of *The Harrisburg* in light of the changing maritime landscape.

B. *Moragne v. States Marine Lines, Inc.*

Moragne was a longshoreman who was killed aboard a ship in Florida's navigable waters. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 376 (1970). His widow sued in state court for wrongful death based upon unseaworthiness and negligence. *See id.* After removal to federal court, the district court dismissed her unseaworthiness claim, holding that general maritime law did not permit recovery for wrongful death based upon unseaworthiness in state territorial waters, and, unlike her negligence-based claim, Florida's wrongful-death statute did not encompass

wrongful-death based upon unseaworthiness. *See id.* The only issue on appeal, therefore, was whether general maritime law recognized a cause of action for wrongful death based upon unseaworthiness. *See id.* at 377.

The Court's analysis began with *The Harrisburg*, which, as noted above, based its holding upon the premise that neither American nor English common law recognized civil actions for injuries that resulted in death. The *Moragne* Court, however, concluded that the Court's construction of the common law rule in *The Harrisburg* "was based upon a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all." *Id.* at 381. Moreover, the Court noted that significant developments in American maritime law had further undercut *The Harrisburg*, including the emergence of state wrongful-death statutes and Congress's enactment of DOHSA and the Jones Act. *See id.* at 390. The Court stated that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. The Court, therefore, found it necessary to address "whether Congress has given such a direction [to deny recovery for wrongful death under general maritime law] in

its legislation granting remedies for wrongful deaths in portions of the maritime domain." *Id.*

Examining the Jones Act and DOHSA to determine if they should be construed to preclude a general maritime cause of action for wrongful death within state territorial waters, the *Moragne* Court pointed to three anomalies that would be perpetuated if Congress had indeed intended the Jones Act and DOHSA to preclude such recovery. First, identical conduct violating federal law in state territorial waters, such as the furnishing of an unseaworthy ship, would give rise to liability only if the victim were injured, but not killed. *See id.* at 395. Second, identical violations of the duty to furnish a seaworthy ship that resulted in death would give rise to liability for unseaworthiness under DOHSA more than three miles from shore but not within three miles of shore if the state's wrongful-death statute did not encompass unseaworthiness claims. *See id.* Third, a seaman, covered by the Jones Act, would have no cause of action for unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such a remedy when allowed by a state statute." *Id.* at 395-96. Based upon these obvious anomalies, which arose from the emergence of unseaworthiness as a viable and prominent maritime cause of action, the Court concluded that Congress could not have intended to foreclose wrongful-death remedies in state territorial waters when it passed the Jones Act and DOHSA. The Court reasoned instead that "[t]he void that existed in maritime law up until 1920 [when Congress enacted DOHSA] was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill

that void, legislated only to the three-mile limit because that was the extent of the problem." *Id.* at 398. Congress did not need to extend its reach into state territorial waters because "[t]he beneficiaries of persons meeting death on territorial waters did not suffer at that time from being excluded from the coverage of [DOHSA]," largely because "the primary basis for recovery under state wrongful death statutes was negligence" and unseaworthiness was a little used cause of action. *Id.* However,

> [s]ince that time the equation has changed drastically, through this Court's transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence. The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act; and it has achieved equal importance for longshoremen and other harbor workers to whom the duty of seaworthiness was extended because they perform work on the vessel traditionally done by seamen. The resulting discrepancy between the remedies for deaths covered by [DOHSA] *and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness* could not have been foreseen by Congress.

Id. at 399 (internal citations omitted and emphasis added).

The Court concluded that the unforeseen development of unseaworthiness as a primary means of recovery under

maritime law — and not a congressional intent to foreclose recovery for wrongful death in state territorial waters — was the primary reason for the anomalies that had emerged after *The Harrisburg*. *See id.* at 399-400. Noting that its recognition of unseaworthiness as a general maritime law wrongful-death cause of action furthered Congress's stated purpose of "uniformity in the exercise of admiralty jurisdiction" in enacting the Jones Act, *id.* at 401 (internal quotation marks omitted), the Court overruled *The Harrisburg*, and stated that "[w]e do not regard the rule of *The Harrisburg* as a closely arguable proposition — it rested on a most dubious foundation when announced [and] has become an increasingly unjustifiable anomaly as the law over the years has left it behind," *id.* at 404. Concluding that its decision "d[id] not require the fashioning of a whole new body of federal law, but merely remov[al of] a bar to access to the existing general maritime law," *id.* at 405-06, the Court held that "an action does lie under general maritime law for death caused by violation of maritime duties," *id.* at 409.[4]

Our examination of the language and context of *Moragne* reveals three crucial points that guide our analysis. First,

4. Two years after the Court's decision in *Moragne*, Congress passed the 1972 amendments to the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1999), and specifically eliminated unseaworthiness as a cause of action for wrongful death as it related to longshoremen and harbor workers, such as Garris's son. *See* 33 U.S.C.A. § 905(b) (West 1986) ("The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness. . . ."). The general maritime law cause of action for wrongful death based upon unseaworthiness still remains viable for true seamen. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990).

the sole issue on appeal in *Moragne* was whether general maritime law recognized a wrongful-death cause of action based upon unseaworthiness; negligence was simply not an issue before the Court. *See id.* at 377. Second, the Court in *Moragne* referred repeatedly to unseaworthiness without expressly mentioning negligence. *See Ford v. Wooten*, 681 F.2d 712, 715 (11th Cir. 1982) (noting that *Moragne* mentioned unseaworthiness but never expressly discussed negligence); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc) ("[*Moragne*] dealt only with an unseaworthiness claim asserted under general maritime law."). Third, the unforeseen evolution of the unseaworthiness doctrine as a powerful tool for recovery under maritime law was the stated predicate for the Court's analysis, and indeed, it played a large part in the Court's decision to overrule *The Harrisburg*. As the Court later recognized in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), "[t]he disparity between the unseaworthiness doctrine's strict-liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark *Moragne* decision." *Id.* at 208.

The *Moragne* Court's clear focus on unseaworthiness, as opposed to maritime duties as a whole, is most evident in the Court's analysis of the three anomalies that arose after the emergence of unseaworthiness as a strict liability doctrine. Two of the three anomalies identified by the Court in *Moragne* were that: (1) identical violations of the duty of seaworthiness, each resulting in death, could give rise to liability more than three miles from shore but not within the territorial waters of a state that did not include unseaworthiness in its wrongful-death statute, and (2) a seaman, covered by the Jones Act, would have no cause of action for

unseaworthiness while a longshoreman "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would have] such-a remedy when allowed by a state statute." *Id.* at 395-96. The Court framed these two anomalies specifically in terms of unseaworthiness; these anomalies were cause for concern only within that context. The third anomaly, that identical violations of federal law, such as the furnishing of an unseaworthy vessel, would give rise to liability if the victim was injured but not killed if the state wrongful-death statute did not encompass unseaworthiness, *see id.* at 395, arguably might have applied to negligence-based actions, at least to the extent that state wrongful-death statutes did not include a cause of action for negligence-based wrongful death. As the Court noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), however, every state had a wrongful-death statute that did provide recovery for negligence-based actions even where the state did not provide similar recovery for unseaworthiness-based actions. *See id.* at 25. Consequently, none of these three anomalies, which played a prominent role in the *Moragne* Court's decision, applied equally between a general maritime law cause of action for wrongful death based upon unseaworthiness and a general maritime law cause of action for wrongful death based upon negligence. We have no difficulty concluding that *Moragne* recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness.

C. Post-*Moragne*

Garris argues, nevertheless, that the Supreme Court's later decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), suggests that *Moragne*'s holding was broader

than a simple recognition of a general maritime law cause of action for wrongful death based upon unseaworthiness. In *Yamaha*, the Supreme Court addressed whether state remedies remain applicable in "maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade." *Id.* at 202. The Court held that "state remedies remain applicable in such cases and have not been displaced by the federal maritime wrongful-death action recognized in [*Moragne*]." *Id. Yamaha* involved a jet ski accident that occurred in navigable waters. The parents of the decedent sued the jet ski manufacturer, which responded that state remedies were not applicable to accidents in navigable waters and that federal maritime law controlled to the exclusion of state law. The Court, therefore, had to address whether "the federal maritime claim for wrongful death recognized in *Moragne* suppl[ies] the exclusive remedy in cases involving the deaths of nonseafarers in territorial waters." *Id.* at 205. In deciding that federal maritime claims for wrongful death did not displace state remedies, the Court briefly discussed *Moragne* and included two footnotes that, according to Garris, support her position. The first, footnote seven, states that

> [i]f *Moragne*'s wrongful-death action did not extend to nonseafarers like [the decedent], one could hardly argue that *Moragne* displaced the state-law remedies the Calhouns seek. Lower courts have held that *Moragne*'s wrongful-death action extends to nonseafarers. We assume, for purposes of this decision, the correctness of that position. Similarly, as in prior encounters, we

> assume without deciding that *Moragne* also provides a survival action. The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock.

Id. at 211 n.7 (internal citations omitted). The other, footnote eleven, states that "[w]hile unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of action, as stated in the Court's opinion, is 'for death caused by violation of maritime duties.' " *Id.* at 214 n.11 (citing, *inter alia*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (stating that negligence is a violation of a maritime duty), and G. Gilmore & C. Black, The Law of Admiralty 368 (2d ed. 1975)).[5]

Garris argues that these footnotes demonstrate that the Court interprets *Moragne* as recognizing a right of action

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5. G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975) states that "[f]rom Justice Harlan's discussion of the 'anomalies' which the *Moragne* decision was designed to avoid several conclusions clearly follow. . . . The remedy provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness. . . ." We note that this treatise offers no analysis to support its assertion that *Moragne* created a general maritime law cause of action for wrongful death based upon negligence. As discussed above, we construe the *Moragne* Court's analysis of the three anomalies differently than Gilmore & Black and conclude that the three anomalies applied only in the context of unseaworthiness. *See supra* part II.B. (discussing the three anomalies). At least one circuit has expressly rejected Gilmore & Black's reading of *Moragne*. *See Ford v. Wooten*, 681 F.2d 712, 717 n.4 (11th Cir. 1982) (referring to "Gilmore & Black's unsubstantiated assertion that negligence is actionable under *Moragne*").

"for death caused by violation of maritime duties," including negligence. *Moragne*, 398 U.S. at 409. We disagree. Although footnotes seven and eleven, read by themselves, arguably support Garris's position, particularly footnote eleven's reference to "the right of action" as being for the "violation of maritime duties," we note that the Court in footnote seven expressly refrained from addressing this question: "The question we confront is not what *Moragne* added to the remedial arsenal in maritime cases, but what, if anything, it removed from admiralty's stock." *Yamaha*, 516 U.S. at 210 n.7. Moreover, the Court in *Yamaha* recognized that *Moragne* relied in large part on unseaworthiness, stating explicitly that "[t]he disparity between the unseaworthiness doctrine's strict liability standard and negligence-based state wrongful-death statutes figured prominently in our landmark *Moragne* decision," *id.* at 208, and that "[t]he uniformity concern that drove our decision in *Moragne* related . . . to the availability of unseaworthiness as a basis of liability," *id.* at 211. *Yamaha*'s recognition of the historical and legal context of *Moragne* further supports our belief that *Moragne* was a limited holding that came in response to a set of concerns that arose specifically in the context of unseaworthiness.

Our conclusion is bolstered by those few circuits that have addressed this issue. In *Ford v. Wooten*, 681 F.2d 712 (11th Cir. 1982), for example, the Eleventh Circuit refused to construe *Moragne* as creating a general maritime law cause of action for wrongful death based upon negligence, stating that *Moragne*, "which mentioned unseaworthiness but never expressly discussed negligence, pertained only to an unseaworthiness claim." *Id.* at 715. Likewise, in *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979)

(en banc), the Fifth Circuit recognized that "*Moragne* did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness." *Id.* at 527. Even the case upon which Garris relies, *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), supports our conclusion that *Moragne* did not itself recognize a general maritime law cause of action for wrongful death based upon negligence. In *Nelson*, the Ninth Circuit addressed "whether or not the Government owes a duty of care to the employees of an independent contractor which has been engaged by the Government to perform hazardous maritime work." *Id.* at 470. In determining the "[t]he precise nature of plaintiff's cause of action," the court noted that prior to *Moragne*,

> there was no general maritime common law cause of action for wrongful death; state wrongful death acts were applied by federal courts sitting in admiralty. We have found no case deciding whether a *Moragne* suit may be based upon negligence as well as unseaworthiness. *We hold that the need for uniformity in maritime wrongful death actions requires extension of Moragne to cover claims based on negligence, to the exclusion of state wrongful death statutes.*

Id. at 473 (internal citation omitted and emphasis added). Thus, although the court found it appropriate to extend *Moragne*, it also recognized that *Moragne* did not itself create a general maritime law cause of action for wrongful death based upon negligence.[6]

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6. Indeed, Garris can point to only one federal court of appeals that has construed *Moragne* consistently with her position. In (Cont'd)

Finally, Garris correctly notes that the *Moragne* Court referred to maritime duties in its holding: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409. We do not believe, however, that this vague reference to "maritime duties," taken in the context of the entire decision and the events prompting that decision, is sufficient to counterbalance the *Moragne* Court's otherwise clear reliance on unseaworthiness as the basis for its decision. The context under which *Moragne* was decided speaks volumes; neither the events leading up to *Moragne* — specifically, the emergence of unseaworthiness as a strict

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Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084 (2d Cir. 1993), the Second Circuit addressed whether "actions brought under the federal courts' admiralty jurisdiction are governed solely by federal maritime law." *Id.* at 1085. The court, after a brief discussion of *Moragne*, noted that

> [t]he Court was addressing the specific issue of what, if any remedy should be available for a wrongful death caused within state territorial waters by a vessel's unseaworthiness, a claim for which there was no right of recovery under applicable state law. In fashioning the remedy, however, the Supreme Court did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law.

Id. at 1088-89 (internal citation omitted). Garris has not offered, nor have we found, another federal court of appeals decision that has adopted *Wahlstrom*'s reading of *Moragne*. For the reasons stated above, we disagree with the Second Circuit's reading of *Moragne*.

liability doctrine and its absence in many state wrongful-death statutes — nor the Court's analysis of the three anomalies, framed in the specific context of unseaworthiness, apply equally to negligence-based actions.[7]

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7. Garris argues that notwithstanding the limited issue before the Court in *Moragne* and its historical context, the *Moragne* Court must have intended to recognize a cause of action of wrongful death for all breaches of maritime duties because it explicitly overruled *The Harrisburg*, which held, in the context of a wrongful-death cause of action based upon negligence under general maritime law, that general maritime law did not afford recovery for wrongful death. Garris argues that "[i]f the Court meant to limit its holding to unseaworthiness, it would have merely distinguished *The Harrisburg*." (Appellant's Br. at 7.) The Court in *The Harrisburg*, however, relied explicitly upon *Insurance Co. v. Brame*, 95 U.S. 754 (1877), which held "that by the common law no civil action lies for an injury which results in death." *Id.* at 756. The Court in *The Harrisburg* found no reason to apply a different rule in admiralty than at common law, and, therefore, concluded that there could be no civil action for wrongful death in admiralty absent a relevant statute. *See The Harrisburg*, 119 U.S. at 213-14. Thus, although the issue before the Court in *The Harrisburg* had to do only with negligence-based wrongful-death actions, its rationale was applicable to all forms of wrongful death. The *Moragne* Court, therefore, had to overrule, rather than distinguish, *The Harrisburg* in order to create a general maritime law cause of action for wrongful death based upon unseaworthiness. The *Moragne* Court's necessary step of overruling *The Harrisburg* does not suggest, as Garris argues, that it actually intended to recognize a general maritime law cause of action for wrongful death based upon negligence that was not before it on appeal.

We note that the Court in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), read *Moragne* as recognizing a general maritime

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Our reading of *Moragne*, both from the Court's language and the context in which it was decided, as well as its subsequent interpretation, leads us to the inescapable conclusion that *Moragne* was, both at its heart and in its facts, an unseaworthiness case. We, therefore, agree with the district court and conclude that *Moragne* did not recognize a general maritime law cause of action for wrongful death based upon negligence.

III.

Having concluded that *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), did not create a general maritime law cause of action for wrongful death based upon negligence, we must now decide whether to extend *Moragne*

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law cause of action for wrongful death based upon unseaworthiness for seamen, as opposed to only longshoremen, partially because "*Moragne* explicitly overruled *The Harrisburg*. *The Harrisburg* involved a true seaman." *Id.* at 30 (internal citation omitted). The other basis for the *Miles* Court's reading of *Moragne*, however, was that "all three of the 'anomalies' to which the *Moragne* cause of action was directed involved seamen. . . . It would be strange indeed were we to read *Moragne* as not addressing a problem that in large part motivated its result." *Id.* The Court in *Miles*, therefore, recognized a general maritime law cause of action for wrongful death based upon unseaworthiness for seamen partially because the reasoning applied equally between seamen and longshoremen. Here, however, unlike in *Miles*, the reasoning does not apply equally between unseaworthiness and negligence; the three "anomalies" in *Moragne* related specifically to a wrongful-death cause of action based upon unseaworthiness and had little relation to a wrongful-death cause of action based upon negligence.

to recognize such a cause of action. Because the creation of a negligence-based wrongful-death action is consistent with the principles of uniformity and consistency that formed the basis of *Moragne*, and because Congress has not affirmatively precluded a negligence-based wrongful-death claim, we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence.

In deciding to recognize a general maritime law cause of action for wrongful death based upon unseaworthiness, the *Moragne* Court concluded that

> the work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.

Id. at 393. Applying this principle, the *Moragne* Court examined the Jones Act and DOHSA to determine whether Congress had expressed an intent to preclude a general maritime law cause of action for wrongful death based upon unseaworthiness. The *Moragne* Court rejected the argument that DOHSA's failure to account for an unseaworthiness-based claim reflected a congressional intent to foreclose that cause of action. The *Moragne* Court, pointing to the three anomalies described above, noted that "[t]he resulting discrepancy between the remedies for deaths covered by [DOHSA] and for deaths that happen to fall within a state

wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress." *Id.* at 399. The *Moragne* Court concluded that the absence of an unseaworthiness-based wrongful-death cause of action in DOHSA did not evidence a congressional intent to foreclose such a cause of action because "no intention appears that [DOHSA] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Id.* at 400. The *Moragne* Court reasoned, instead, that creation of a general maritime law cause of action for wrongful death based upon unseaworthiness was consistent with the purpose of the Jones Act, which

> was intended to achieve uniformity in the exercise of admiralty jurisdiction by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to require the present nonuniformity in the effectuation of the duty to provide a seaworthy ship.

Id. at 401 (internal quotation marks omitted). The *Moragne* Court concluded that "Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner." *Id.* at 393.

The *Moragne* Court's examination of the three anomalies, the Jones Act, and DOHSA is instructive. It

demonstrates an analytical framework under which the *Moragne* Court created a general maritime law cause of action for wrongful death based upon unseaworthiness under circumstances where: (1) Congress had not affirmatively expressed an intention to bar such a cause of action; and (2) creation of that cause of action was consistent with the policies of general maritime law articulated in the Jones Act — uniformity in the exercise of admiralty jurisdiction.

This analytical framework likewise applies in the present case and counsels in favor of recognizing a *Moragne* action based upon negligence.[8] In the present case, Garris has no right of recovery under the existing statutory scheme. Garris cannot recover under DOHSA because her son died within state territorial waters. She cannot recover under the Jones Act because her son was a harbor worker, and not a seaman. And, she apparently cannot recover against Norfolk under the Virginia wrongful-death statute because the Virginia worker's compensation statute confers broader immunity than the LHWCA; unlike the LHWCA, which bars suit only against the immediate employer,[9] the Virginia statute bars

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8. A "*Moragne* action" or "*Moragne* cause of action" is simply another term for a general maritime law cause of action for wrongful death. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 30 (1990) (referring to a "*Moragne* cause of action" in deciding whether to apply a general maritime law wrongful-death action to seamen); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993) (referring to a "*Moragne* action").

9. The LHWCA sets forth the exclusive remedies for a longshoreman or harbor worker's injury or death "occurring upon

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state tort claims against contractors as well as immediate employers.[10] *See* Va. Code Ann. §§ 65.2-302, 307 (Michie Supp. 1999); *Ward v. Norfolk Shipbuilding & Drydock Corp.*, 770 F. Supp. 1118, 1120 (E.D. Va. 1991) ("Under the Virginia Act, a contractor such as Norshipco is the 'statutory employer' of a subcontractor's or sub-subcontractor's employee, and therefore liable for compensation to such an employee. The exclusivity provision of the Virginia Act makes the contractor immune from suit for negligence, provided the subcontractors were performing the 'normal work' of the contractor. The LHWCA reaches the opposite result with respect to the liability of a contractor to a subcontractor's injured employee."); *cf. Garvin v. Alumax of South Carolina*, 787 F.2d 910, 918 (4th Cir. 1986) ("Congress has diligently attempted to preserve state law governance of state law third party claims by recipients of

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the navigable waters of the United States," including adjoining piers or dry docks, *see* 33 U.S.C.A. § 903(a) (West 1986), for injuries caused by a maritime employer, co-employee, or vessel. *See* 33 U.S.C.A. §§ 905, 933(i) (West 1986). The LHWCA requires the employer, *inter alia*, to compensate the injured longshoreman or harbor worker for certain disability costs, recovery costs, and to provide death benefits to certain beneficiaries. *See* 33 U.S.C.A. §§ 906-910, 914 (West 1986). It also permits the longshoreman or harbor worker to sue the employer if the employer fails to pay the prescribed benefits. *See* 33 U.S.C.A. § 905(a). As part of this compensation scheme, the LHWCA confers immunity to an immediate employer from tort suits by injured employees. *See id.*

10. That is presumably why Garris has sued only Gresham, and not Norfolk, in state court under the Virginia wrongful-death statute.

LHWCA compensation. Since there is no conflict between differing rules of immunity and application of South Carolina's rule [granting immunity to contractors] will not frustrate the effectiveness of any federal law . . . the contractor [ ] is immune from this state tort claim."). In other words, because Garris's son was a harbor worker who happened to be killed in Virginia's territorial waters, Garris cannot recover against Norfolk absent a federal maritime law cause of action for wrongful death based upon negligence.

We see no reason to deny Garris a basis of recovery simply because her son was a harbor worker who died in Virginia, as opposed to another state that permits recovery against contractors. First, Congress has not affirmatively expressed an intent to preclude a negligence-based wrongful-death cause of action against a third party. As the Court noted in *Moragne*, DOHSA does not preclude a "nonstatutory federal remed[y] that might be found appropriate to effectuate the policies of general maritime law." *Moragne*, 398 U.S. at 400. And, like DOHSA, the LHWCA does not evidence a congressional intent to preclude a general maritime law cause of action against third parties for wrongful death based upon negligence.[11] Second, recognition of a general maritime law

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11. The LHWCA generally does not address rights of recovery against third parties except in one instance: the LHWCA eliminated unseaworthiness as a cause of action against the vessel with respect to longshoremen and harbor workers and replaced that cause of action by permitting longshoremen and harbor workers to bring suit for negligence "against [the] vessel as a third party." *See* 33 U.S.C.A. § 905(b) (West 1986); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 28 (1990) ("If Moragne's widow brought her action today, it would be

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cause of action for wrongful death based upon negligence "effectuate[s] the policies of general maritime law" because it is consistent with the policy of achieving uniformity in admiralty law. *Id.* at 400. The location of a harbor worker's death — a fact of true happenstance — should not determine

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foreclosed by statute."); *Garvin v. Alumax of South Carolina*, 787 F.2d 910, 917 (4th Cir. 1986) ("Except with respect to claims against vessels addressed in 33 U.S.C.A. § 905(b), the LHWCA does not address the substantive rights of claimants against third parties.").

We recognize that Congress's removal of the unseaworthiness cause of action for longshoremen and harbor workers reduced their overall right of recovery. *See Holland v. Sea-Land Serv., Inc.*, 655 F.2d 556, 558-59 (4th Cir. 1981) (stating that Congress "substantially limited the right of longshoremen to recover from third parties in tort actions" by eliminating unseaworthiness as a cause of action, but "preserve[d] his right under prior law to recover for third party negligence"). This restriction of rights, however, occurred within the limited context of unseaworthiness, and for a very specific reason: " '[t]he rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board a vessel while it is in port.' " *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1198 (4th Cir. 1991) (Ervin, J., dissenting) (quoting H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4703). We do not believe that this limited curtailment of longshoremen and harbor workers' rights is inconsistent with our recognition of a general maritime law cause of action against third parties for wrongful death based upon negligence, nor does it express an affirmative congressional intent to preclude such a cause of action. Indeed, the LHWCA expressly leaves intact a longshoreman or harbor worker's rights against all other third parties except the employer and "persons in the same employ." *See* 33 U.S.C.A. § 933(i) (West 1986).

an injured party's ability to recover for wrongful death.[12] Because such a cause of action is consistent with the framework set forth in *Moragne*, we hold that a general maritime law cause of action against third parties for wrongful death based upon negligence is available where a

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12. Our recognition of a federal cause of action for wrongful death based upon negligence does not conflict with *Garvin v. Alumax of South Carolina*, 787 F.2d 910 (4th Cir. 1985), in which we held that South Carolina's worker's compensation statute conferred immunity to a contractor from an injured longshoreman's state tort action even though the injured longshoreman received benefits only under the LHWCA. *See id.* at 918. In *Garvin*, we noted that "[t]he federal immunity rule is to be applied when a third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied." *Id.* at 917. Because *Garvin* dealt only with a state claim, and not a federal claim, *Garvin* is not inconsistent with our decision in the present case.

Nor does a negligence-based *Moragne* cause of action violate "important federalism principles" by impermissibly interfering with Virginia's grant of immunity to Norfolk under state law. (Appellee's Br. at 21.) First, the broader Virginia immunity rule would still apply to any state tort actions brought by Garris. To that extent, a *Moragne* cause of action does not interfere with state law at all. Second, although "[f]ederal maritime law has long accommodated the States' interest in regulating maritime affairs within their territorial waters . . . . Permissible state regulation . . . must be consistent with federal maritime principles and policies." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 n.13 (1996). *Cf. Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953) ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of this Court."). Accordingly, Norfolk's federalism argument does not deter us from recognizing a *Moragne* cause of action in this context.

harbor worker, such as Garris's son, dies within state territorial waters.[13] For that reason, we reverse the district

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13. We recognize that the Supreme Court, in *Dooley v. Korean Air Lines Co.*, 118 S.Ct. 1890 (1998), declined to extend general maritime law to permit recovery for pre-death pain and suffering under a general maritime law survival cause of action. *See id.* at 1895. In *Dooley*, the Court rejected the argument that DOHSA, which does not authorize recovery for pre-death pain and suffering, did not bar such damages under general maritime law because DOHSA is a wrongful-death statute rather than a survival statute. *See id.* The Court stated that

> DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.

Id. at 1894-95. The Court noted that "[b]ecause Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages." *Id.* at 1895. Moreover, "it cannot be contended that DOHSA has no bearing on survival actions; rather, Congress has simply chosen to adopt a more limited survival provision." *Id.* The Court concluded that "[e]ven in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action with which Congress was certainly familiar but nonetheless declined to adopt." *Id.*

Unlike DOHSA, which addressed the remedy sought by the petitioners in *Dooley*, and, therefore, pervaded the field on that issue, the LHWCA does not address the third party cause of action that Garris seeks in the present case. In fact, as noted above, the LHWCA addresses third party rights only in the limited context of eliminating

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court's dismissal of Garris's general maritime law negligence-based claim and remand for further proceedings consistent with this opinion.

IV.

In conclusion, the language of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), combined with its historical and legal context and the absence of persuasive authority to the contrary, leads us to conclude that *Moragne* recognized only a general maritime law cause of action for wrongful death based upon unseaworthiness and not for wrongful death based upon negligence. However, because Congress has not affirmatively precluded a negligence-based cause of action, and because such a cause of action is consistent with the principle of uniformity expressed in *Moragne* and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) ("Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."), we find it appropriate to recognize a general maritime law cause of action for wrongful death based upon negligence. Accordingly, we reverse the district court's dismissal of Garris's general maritime law negligence-based claim and remand for further proceedings.

REVERSED AND REMANDED

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an unseaworthiness action against the vessel and replacing it with a negligence action against the vessel. Thus, unlike the Court in *Dooley*, we can find no congressional intent that precludes us from recognizing a *Moragne* cause of action against third parties other than vessels for wrongful death based upon negligence.

Appendix F

HALL, Senior Circuit Judge, concurring in the judgment:

Over the past three decades, Justice Harlan's opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), has come to occupy an important place within the Supreme Court's canon. Generations of law students have studied *Moragne* for its scholarly discussion of legal process and the role of precedent. But before those students reach these abstract questions, their professors have no doubt tormented them by asking a seemingly simple question that defies a simple answer: What, precisely, is the holding of *Moragne*?

I.

The majority, which concludes in the first instance that *Moragne*'s holding is limited to wrongful death unseaworthiness claims, gives what is in many ways a reasonable answer to that thorny question — albeit one with which I cannot concur. And Part III of the majority opinion ultimately reaches the right result by finding a *Moragne* cause of action on the instant set of facts. The majority's explanation of why congressional silence and Appellant's lack of a state-law remedy warrant the creation of a federal admiralty remedy is particularly laudable. Because I would hold that *Moragne* already covers Appellant's claim, I find it unnecessary to reach Part III's analysis. But if I were inclined to interpret *Moragne* as narrowly as the majority does, I would certainly assent to Part III's sound discussion. Those words of explanation having been voiced, I shall explain why, in my view, *Moragne* itself created a cause of action for negligence-based wrongful death.

Appendix F

II.

In *The Harrisburg*, 119 U.S. 199 (1886), the Supreme Court held that general maritime law provided no cause of action for wrongful death. At the time, any successful wrongful death suit would have required the plaintiff to prove that the defendant acted negligently, and negligence was indeed the theory of liability pressed by *The Harrisburg* plaintiff and the only theory of negligence considered by the Supreme Court. *See id.* at 204.

Fifty-eight years later the Supreme Court recognized, for the first time, the doctrine of unseaworthiness. *See Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *see also Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 208 (1996) ("Prior to 1944, unseaworthiness was an obscure and relatively little used liability standard . . . .") (internal quotations marks omitted). In contrast to negligence, unseaworthiness is a strict liability theory flowing from the ship's owner to its crew, longshoreman, or harbor workers aboard the ship. *See Ballwanz v. Isthmian Lines*, 319 F.2d 457, 461 (4th Cir. 1963).

Twenty-six years after *Mahnich*, the Supreme Court decided *Moragne*, 398 U.S. at 375. In *Moragne* the plaintiff was a longshoreman's widow who brought an *unseaworthiness* suit against the owner of a ship on which her husband had perished. Like Appellant, the *Moragne* plaintiff's loved one had been killed while working aboard a vessel in navigable waters within a state's territorial waters. *See id.* at 376. Although no federal statute authorized recovery for the widow, the Supreme Court nevertheless allowed her suit to

proceed. In order to do so, the Supreme Court said it was compelled to overrule *The Harrisburg*, stare decisis considerations notwithstanding. In broad language, Justice Harlan, writing for a unanimous Court, announced the rule of *Moragne*: "We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409.

Two aspects of the *Moragne* opinion are of pivotal importance in the case at bar. First, the court explicitly announced that a cause of action exists for a "violation of maritime duties," not just for "unseaworthiness." Had the Court sought to limit its holding to unseaworthiness, it could have easily done so. Second, and relatedly, had the Supreme Court sought only to allow the plaintiff to recover in her unseaworthiness-based wrongful death action, it could easily have distinguished *The Harrisburg*. After all, *The Harrisburg* held that there was no general maritime law cause of action for negligence-based wrongful death suits, but *The Harrisburg* said nothing about the presence or absence of a general maritime law cause of action for unseaworthiness-based wrongful death suits, since the unseaworthiness theory of liability did not enter the Supreme Court's lexicon until fifty-eight years *after The Harrisburg* was handed down. But the Supreme Court consciously, and with much fanfare,[1]

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1. Justice Harlan's opinion in *Moragne* devotes seven fascinating pages to the "very weighty considerations" of stare decisis that augured against overruling *The Harrisburg*. *See Moragne*, 398 U.S. at 403-09. Anyone who reads this discussion comes away from it profoundly impressed with Justice Harlan's reverence for precedent and his reluctance to cast aside a controlling

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overruled *The Harrisburg* instead of distinguishing it.[2] In so

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precedent in the absence of compelling reasons to do so. Indeed, scholars have long appreciated Justice Harlan's particularly hardy reverence for precedent, *see, e.g.*, Louis R. Cohen, *A Biography of the Second Justice Harlan*, 91 Mich. L. Rev. 1609, 1612 (1992) (reviewing *Tinsley E. Yarbrough, John Marshall Harlan: Great Dissenter of the Warren Court* (1992)), and deep commitment to the principle of judicial restraint, *see, e.g.*, Stephen M. Dane, *"Ordered Liberty" and Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. Cin. L. Rev. 545 (1982).

The majority today reads *Moragne* as having created a cause of action for unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits. Plainly, however, if the *Moragne* Court had favored such a distinction, Justice Harlan could have simply distinguished *The Harrisburg* by noting that it involved a negligence-based wrongful death cause of action, whereas *Moragne* involved an unseaworthiness-based wrongful death cause of action. By doing so, the Court could have avoided the unseemliness involved in overturning a well-established precedent. Two possibilities follow from the majority's holding today: Either *Moragne*'s overruling of *The Harrisburg* was mere dicta or Justice Harlan and his eight colleagues lacked the capacity to distinguish a case on its facts. I find neither notion plausible. A more satisfying reading of *Moragne*'s treatment of *The Harrisburg* is that the unanimous Court felt compelled to overrule *The Harrisburg*'s holding that general maritime law did not create a negligence-based wrongful death cause of action, and that the Court saw no logical basis for holding that general maritime law recognizes unseaworthiness-based wrongful death suits, but not negligence-based wrongful death suits.

2. The majority contends that *Moragne* had to overrule *The Harrisburg* because *The Harrisburg*'s "rationale was applicable

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doing, the Court must have believed that there was no principled basis for distinguishing between negligence-based wrongful death suits and unseaworthiness-based wrongful death suits under general maritime law. Yet that is precisely the distinction that the majority draws today.

In order to fully understand *Moragne*, courts have often looked to the three famous "anomalies" that *The Harrisburg* and pre-*Moragne* developments had wrought. *See, e.g.*, *Miller v. American President Lines*, 989 F.2d 1450, 1458 (6th Cir. 1993); *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 323 (5th Cir. 1982). The *Moragne* Court was terribly troubled by these inconsistencies that had emerged in

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to all forms of wrongful death." Maj. op. at 15 n.7. In so doing, the majority emphasizes *The Harrisburg*'s reliance on *Insurance Co. v. Brame*, 95 U.S. 754 (1877), which held that under the common law, "actions for injuries to the person abate by death," *see id.* at 759. I fail to see why *Brame* alters the analysis. At the time of *The Harrisburg*, the common law recognized no wrongful death cause of action. Among the possible theories of liability, the only candidate for a wrongful death recovery action would have been negligence because, as I noted above, the strict-liability theory of wrongful death recovery would not make its way into American admiralty jurisprudence for another fifty-eight years. It is therefore not surprising that *The Harrisburg* Court considered the question before it in the narrowest of terms: "Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, *caused by negligence*, in the absence of an act of congress or a statute of a state giving a right of action therefor?" 119 U.S. at 204 (emphasis added). Thus, the majority's view appears to be that the *Moragne* Court read *The Harrisburg* to preclude a cause of action that had not yet been invented.

admiralty law, whereby a seaman might recover damages if injured within territorial waters, but not if killed within those same waters; whereby a seaman's estate could recover in an unseaworthiness action if he was killed on the high seas but not if killed within a state's territorial waters; and whereby a seaman's estate could not recover for wrongful death if he were killed within territorial waters, but a longshoreman's estate could. *See id.* at 395-96. By overruling *The Harrisburg* and removing these anomalies, the Court saw itself as assuring "uniform vindication of federal policies [by] removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401.

The majority concludes that *Moragne*'s three anomalies are not directly implicated by the instant case. I disagree. The purpose of *Moragne* was to allow individuals who are, for all intents and purposes, equally situated, to obtain equal recoveries in the event of their deaths. In other words, happenstance should not determine whether an individual's heirs have a cause of action in the event of his untimely death. But, as the majority points out, Appellant's misfortune here is purely driven by happenstance. Maj. op. at 17-19. Had Garris been a seaman, Appellant would have had a wrongful death cause of action under the Jones Act or general maritime law. But because Garris was a longshoreman, the Jones Act is inapplicable, and Appellant is now unable to bring any suit under general maritime law. Had Garris's death resulted from the actions of the ship's owner, Appellant could have recovered under the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). But because his death allegedly resulted from the actions of subcontractors working

aboard the ship, such a remedy is not available to Appellant. I am hardly alone in understanding *Moragne*'s anomalies to be directly implicated by the set of facts presented in the instant case. To Grant Gilmore and Charles Black, two of their generation's towering legal minds, it "clearly follow[ed]" from *Moragne* that "The *Moragne* remedy . . . . provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Grant Gilmore & Charles L. Black, Jr. *The Law of Admiralty* 368 (2d ed. 1974).

In 1980, a Ninth Circuit opinion cited page 368 of the Gilmore and Black treatise and largely agreed with those scholars' reading of *Moragne*. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). While observing that no post-*Moragne* published opinion had decided whether a *Moragne* suit "could be based on negligence as well as unseaworthiness," the court expressed sympathy for Gilmore and Black's view that the obvious implication of *Moragne* was that negligence suits were covered under the general maritime law. The Court held that the "need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes." *Id.* The majority reads *Nelson* as recognizing "that *Moragne* did not itself create a general maritime law cause of action for wrongful death based upon negligence." Maj. op. at 13. Although the question is admittedly close, I read no such analysis into *Nelson*, and believe the majority places too much emphasis on *Nelson*'s use of the word "extension."[3]

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3. When an opinion is obviously applicable to a nearly identical set of facts, it is nevertheless accurate to say that the opinion still must be "extended" to cover the second set of facts. Sometimes, (Cont'd)

Indeed, *Nelson*'s invocation of page 368 of Gilmore and Black suggests a contrary view.

As the majority recognizes, the Second Circuit has also held that *Moragne* created a negligence-based cause of action as well as an unseaworthiness-based cause of action. *See Wahlstrom v. Kawasaki Heavy Indus.*, 4 F.3d 1084 (2d Cir. 1993). The Second Circuit correctly held that the *Moragne* Court "did not limit the new right of recovery to unseaworthiness claims, but instead established a general remedy for wrongful death under maritime law." *Id.* at 1088-89. The majority's assertion that no court has adopted *Wahlstrom*'s reasoning is misleading. *Wahlstrom* is consistent with *Nelson*, and *Wahlstrom* was the last circuit court case to consider the issue that is before this Court today.

The majority seeks solace in an Eleventh Circuit case, but that reliance is somewhat misplaced. Admittedly, the Eleventh Circuit has held that *Moragne* does not create a negligence-based wrongful death cause of action "where a cause of action exists for wrongful death under DOHSA [the Death on the High Seas Act]." *Ford v. Wooten*, 681 F.2d 712, 716 (11th Cir. 1982). But it is undisputed that Appellant has no DOHSA remedy here, because Garris's injury occurred in territorial waters. In *Ford*, the Eleventh

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a minimal extension of the prior precedent to a situation clearly controlled by that precedent even warrants the publication of a subsequent opinion. *See, e.g., Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999) (extending *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994), while recognizing that *Kelley* plainly controlled the case at bar).

Circuit premised its opinion upon a balancing of interests where the interest in uniformity favored granting a remedy and "consistency with federal remedial schemes" favored withholding a remedy. The court held that "[a]t least *where statutory remedies exist*, we deem consistency with the federal remedial schemes to be more important than the somewhat limited loss of uniformity." *Id.* (emphasis added). Notably, a general maritime law cause of action would have conflicted with DOHSA because DOHSA "already provides a cause of action for death due to negligence." *Id.* Where, as in the case at bar, no federal statute authorizes or bars a recovery from the third party alleged to have caused Garris's death, there is nothing to balance the interest in uniformity, so *Moragne* creates a cause of action.[4]

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4. Both parties invoke the Fifth Circuit's precedents as supporting their respective readings of *Moragne*. Surprisingly, both parties appear to be correct. In *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 527 (5th Cir. 1979) (en banc), the Fifth Circuit held:

> Other reasons, somewhat more complex, appear to preclude interpreting the Jones Act as being supplemented by a *Moragne*-engendered negligence action for damages if (but only if) death occurs in territorial waters or on land. *Moragne* did not create or even discuss an action for negligence; it dealt only with death occasioned by unseaworthiness. The suggestion that the Jones Act measure of damages can be supplemented by the *Moragne*-cause-of-action-*Gaudet*-damages rule will not bear analysis . . . .

A decade later, the Fifth Circuit appears to have reversed course, observing that in "Moragne, the Supreme Court recognized a

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Appendix F

Any lingering doubts about whether *Moragne* created a negligence-based wrongful death cause of action were laid to rest by the Supreme Court in 1996. In *Yamaha Motor Corp.*, 516 U.S. at 199, the Court held that *Moragne* did not preempt state law remedies for wrongful death resulting from injuries to nonseamen in territorial waters. But it is one of *Yamaha*'s footnotes, not its holding, that definitively resolves the instant case. Footnote 11 reads in pertinent part:

> While unseaworthiness was the doctrine immediately at stake in *Moragne*, the right of

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wrongful death action for negligence and unseaworthiness under the general maritime law." *Miles v. Melrose*, 882 F.2d 976, 985 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Ordinarily, an en banc opinion would trump a panel opinion, but that might not be the case where, as here, the panel opinion post-dates the en banc opinion or where, as here, only the panel opinion was affirmed by the Supreme Court. The Fifth Circuit thus appears to find itself on both sides of a circuit split.

Nevertheless, the majority opinion cites *Ivy* as the current Fifth Circuit law. Maj. op. at 13. Assuming, *arguendo*, the correctness of that assessment, I would emphasize that *Ivy*'s holding is inapplicable to the case at bar. The *Ivy* court's analysis was animated by the problem of double recoveries for someone under *Moragne* and the Jones Act. Appellant, and those similarly situated, are not eligible for such a double recovery, since the Jones Act covers seamen, but not longshoremen. The Longshore & Harbor Workers' Compensation Act (LHWCA), which covers Garris, does not provided for a wrongful death cause of action against a subcontractor. Hence, there is no risk that Appellant might recover twice, unless one construes funeral benefits from an employer and wrongful death benefits from a third-party subcontractor to be a double recovery.

> action, as stated in the Court's opinion, is "for death caused by violation of maritime duties." . . . *See* . . . *Kermarec*, 358 U.S. at 630, 79 S.Ct. at 409-410 (negligence). *See also* G. Gilmore & C. Black, *The Law of Admiralty* 368 (2d ed. 1975).

Id. at 214 n.11. This footnote is a crucial clue for at least two reasons. First, the Court emphasized that the *Moragne* cause of action covered something in addition to unseaworthiness causes of action, and the citation to *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959), makes it rather clear that negligence causes of action for wrongful death were part of that "something" encompassed by the broader language "violation of maritime duties." *See* Steven F. Friedell, *Searching for a Compass: Federal and State Law Making Authority in Admiralty*, 57 La. L. Rev. 825, 835 (1997) ("[T]he holding in *Moragne* was not limited to unseaworthiness. The Court held that 'an action does lie under general maritime law for death caused by violation of maritime duties.' As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence.").

Second, and perhaps even more importantly, the Supreme Court cited favorably to the aforementioned page 368 of the Gilmore and Black treatise, where the authors concluded that the *Moragne* remedy "provides recovery for deaths caused by negligence as well as for deaths caused by unseaworthiness." Gilmore & Black, *supra*, at 368. This citation, combined with the text of footnote 11 and the citation to *Kermarec*, make it clear that the *Yamaha* Court understood *Moragne*'s remedy as encompassing claims like

Appellant's. Although footnote 11 is dicta, it deserves special solace from this Court because it clarifies the Supreme Court's understanding of one of its own opinions. *See United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("Even though that statement by the Supreme Court in *Local 93* was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").

III.

Ultimately, the agreement between my view and the majority's is far more important than our points of contention. It goes without saying that Appellant has a cause of action under either reading of *Moragne*. I write separately to emphasize that in my view Appellant's cause of action is not a new ship that has suddenly appeared on the horizon. Rather, Appellant's cause of action has been lurking just under the surface for quite some time. For the foregoing reasons, I concur in the judgment.

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 1, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2368
(CA-98-382-2)

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff – Appellant,

versus

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Defendant – Appellee,

and

E.T. GRESHAM, INCORPORATED,

Defendant.

ON PETITION FOR REHEARING EN BANC

Appellees filed a petition for rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority

of judges in active service in favor of rehearing en banc. Judges Widener and Niemeyer voted to rehear the case en banc. Chief Judge Wilkinson and Judges Murnaghan, Wilkins, Luttig, Williams, Michael, Motz, Traxler, and King voted against rehearing en banc.

The Court denies the petition for rehearing en banc.

Entered at the direction of Judge Williams for the Court.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX H — DISSENTING OPINION OF JUDGE WIDENER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT TO THE ORDER DENYING PETITION FOR REHEARING DATED AND FILED JUNE 2, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2368
(CA-98-382-2)

CELESTINE GARRIS, Administratrix of the Estate of Christopher Garris, deceased,

Plaintiff – Appellant,

versus

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Defendant – Appellee,

and

E.T. GRESHAM, INCORPORATED,

Defendant.

ON PETITION FOR REHEARING EN BANC

Appendix H

WIDENER, Circuit Judge, dissenting:

I respectfully dissent to the denial of rehearing en banc in this case. I would grant rehearing en banc in this case of first impression.

The panel opinion relies almost exclusively on the opinion in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). In *Moragne*, the Court addressed discrepancies "between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful death statute not encompassing unseaworthiness . . . ." 398 U.S. at 399. Finding that Congress could not have foreseen these discrepancies, the Court concluded that the Death on the High Seas Act did not foreclose any nonstatutory federal remedies that would effectuate the policies of general maritime law. *Moragne*, 398 U.S. at 399-400.

With respect to longshoremen and other harbor workers, the *Moragne* Court found that a claim for wrongful death based upon the unseaworthiness of a vessel was viable because the unseaworthiness doctrine had been extended to longshoremen as the principal vehicle for recovery of injury or death while performing work on a vessel, *Moragne*, 398 U.S. at 399, on the authority of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). *Sieracki* extended to land-based stevedores the right given by maritime law to seamen to recover against the ship owner, without the need of proving negligence, for injuries caused by the unseaworthiness of the vessel. Following *Sieracki*, courts made awards to longshoremen on the basis of unseaworthiness. And, as noted, the *Moragne* Court specifically relied on the *Sieracki*

decision to extend the coverage of a wrongful death cause of action based on unseaworthiness to a longshoreman.

In 1972, Congress enacted various amendments to the Longshore and Harbor Workers' Compensation Act. As part of these amendments, Congress added 33 U.S.C. § 905(b), which specifically eliminates the right of longshoremen and harbor workers to recover against the vessel on the basis of unseaworthiness. See *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 165 (1981) (longshoreman's right to recover for unseaworthiness abolished); Herbert R. Baer, *Admiralty Law of the Supreme Court* § 6-17 at 90-91 (2d ed. Supp. 1977). The legislative history mentions *Sieracki* by name and rejects the holding of that case to the extent that it created an absolute duty of seaworthiness to "longshoreman and others who performed work on the vessel." H.R. Robert E. Payne. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702. Thus, because *Moragne* relies on *Sieracki* to extend a wrongful death action based on unseaworthiness to longshoremen and harbor workers, to the extent of that reliance *Moragne* was superceded and reversed by the 1972 amendments to the act. Thus, the panel opinion's reliance on this portion of *Moragne* is misplaced.

The legislative history of the 1972 amendments to the Act are particularly relevant to our decision in this case. It is clear from this history that Congress intended to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial

nomenclature it may be called, such as 'unseaworthiness', non-delegable duty', or the like." 1972 U.S.C.C.A.N 4698, 4703.[1]

In spite of this explicit expression of Congressional intent, the panel opinion creates a new cause of action which is exactly the opposite of that which Congress intended. First, the decision creates a "special maritime theory of liability" — one for wrongful death based on negligence. Second, the decision gives an employee injured aboard a vessel a cause of action that a Virginia worker on shore would not have.

In a case such as this in which Congress has made its intention explicit, I suggest it is beyond our warrant to substitute our notions of public policy for that of Congress. *Local 1976, United Bhd. of Carpenters and Joiners v. N.L.R.B.*, 357 U.S. 93, 100 (1958) ("[I]t is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has enacted after ascertaining what it is that Congress has enacted."). "Whether the federal policy is a wise one is for the Congress and the Chief Executive to determine. Once they have spoken, it is our function to enforce their will." *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285, 293 (1963).

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1. As *Scindia* points out both the Senate and House Committee Reports agree on this language. *Scindia*, 451 U.S. at 165-166 n.13.

APPENDIX I — RELEVANT STATUTES

The Longshore and Harbor Workers Compensation Act, 33 U.S.C.A. §§ 903(a), 904, 905(a)-(b), 909 (West 1986).

§ 903. Coverage.

(a) Disability or death; injuries occurring upon navigable waters of United States. Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

§ 904. Liability for compensation.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Appendix 1

§ 905. Exclusiveness of liability.

(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel. In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary

shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

§ 909. Compensation for death.

If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $3,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16 2/3 per centum of such wages for each such child; in case of the

death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be one surviving child of the deceased, but no widow or widower, then for the support of such child 50 per centum of the wages of the deceased; and if there be more than one surviving child of the deceased, but no widow or dependent husband, then for the support of such children, in equal parts 50 per centum of such wages increased by 16 2/3 per centum of such wages for each child in excess of one: Provided, That the total amount payable shall in no case exceed 66 2/3 per centum of such wages.

(d) If there be no surviving wife or husband or child, or if the amount payable to a surviving wife or husband and to children shall be less in the aggregate than 66 2/3 per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters, if dependent upon the deceased at the time of the injury, and any other persons who satisfy the definition of the term "dependent" in section

152 of Title 26, but are not otherwise eligible under this section, 20 per centum of such wages for the support of each such person during such dependency and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66 2/3 per centum of such wages and the amount payable as hereinbefore provided to widow or widower and for the support of surviving child or children.

(e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 906(b) of this title, but —

> (1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 906(b)(1) of this title; and
>
> (2) in the case of a claim based on death due to an occupational disease for which the time of injury (as determined under section 910(i) of this title) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

(f) All questions of dependency shall be determined as of the time of the injury.

Appendix 1

The Virginia Workers' Compensation Act, Va. Code Ann. §§ 65.2-302, -307, -512, -515, -516 (Michie 1995 & Supp. 1999).

§ 65.2-302. Statutory employer.

A. When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

B. When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then the contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

C. When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the

performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

§ 65.2-307. Employee's rights under Act exclude all others.

A. The rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death.

B. Notwithstanding this exclusion, nothing in the Act shall bar an employer from voluntarily agreeing to pay an employee compensation above and beyond those benefits provided for in the Act. Nothing herein, however, shall be deemed to affect or alter any existing right or remedy of the employer or employee under the Act.

§ 65.2-512. Compensation to dependents of an employee killed; burial expenses.

A. If death results from the accident within nine years, the employer shall pay, or cause to be paid, compensation in weekly payments equal to 66 2/3 percent of the employee's average weekly wages, but not more than 100 percent of the

average weekly wage of the Commonwealth as defined in § 65.2-500 nor less than 25 percent of the average weekly wage as defined therein:

1. To those persons presumed to be wholly dependent upon the deceased employee as set forth in subdivisions A 1, A 2, and A 3 of § 65.2-515, for a period of 500 weeks from the date of injury; or

2. If there are no total dependents pursuant to subdivision A 1, A 2, or A 3 of § 65.2-515, to those persons presumed to be wholly dependent as set forth in subdivision A 4 of § 65.2-515, and to those determined to be wholly dependent in fact, for a period of 400 weeks from the date of injury; or

3. If there are no total dependents, to partial dependents in fact, for a period of 400 weeks from the date of injury.

B. The employer shall also pay burial expenses not exceeding $10,000 and reasonable transportation expenses for the deceased not exceeding $1,000.

C. Benefits shall be divided equally among total dependents, to the exclusion of partial dependents. If there are no total dependents, benefits shall be divided among partial dependents according to the dependency of each upon the earnings of the employee at the time of the injury, in the proportion that partial dependency bears to total dependency.

D. If benefits are terminated as to any member of a class herein, that member's share shall be divided among the remaining members of the class proportionately according to their dependency.

E. When weekly payments have been made to an injured employee before his death, the compensation to dependents shall begin from the date of the last of such payments but shall not continue for a period longer than specified in subsection A of this section.

§ 65.2-515. Persons conclusively presumed to be wholly dependent.

A. The following persons shall be conclusively presumed to be dependents wholly dependent for support upon the deceased employee:

1. A wife upon a husband whom she had not voluntarily deserted or abandoned at the time of the accident or with whom she lived at the time of his accident, if she is then actually dependent upon him;

2. A husband upon a wife whom he had not voluntarily deserted at the time of the accident or with whom he lived at the time of her accident, if he is then actually dependent upon her;

3. A child under the age of eighteen upon a parent and a child over such age if physically or mentally incapacitated from earning a livelihood

or a child under the age of twenty-three if enrolled as a full-time student in any accredited educational institution; and

4. Parents in destitute circumstances, provided there be no total dependents pursuant to other provisions of this section.

B. As used in this section, the term "child" shall include a stepchild, a legally adopted child, a posthumous child, and an acknowledged illegitimate child, but shall not include a married child; and the term "parent" shall include stepparents and parents by adoption.

§ 65.2-516. Other cases of dependency.

In all other cases questions of dependency in whole or in part shall be determined in accordance with the facts as the facts are at the time of the accident; but no allowance shall be made for any payment made in lieu of board and lodging or services and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.